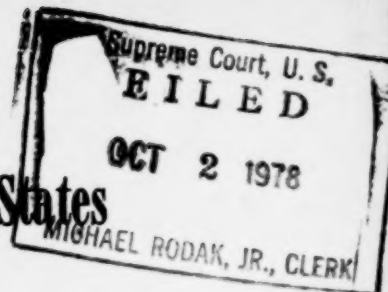


IN THE  
**Supreme Court of the United States**



October Term, 1978

No. 78-294

SOUTHERN CALIFORNIA EDISON COMPANY,

*Appellant.*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF  
CALIFORNIA, D. W. HOLMES, WILLIAM SYMONS, JR.,  
VERNON L. STURGEON, LEONARD ROSS, and ROBERT  
BATINOVICH, the members of and constituting said  
Public Utilities Commission,

*Appellees.*

On Appeal From the Supreme Court of the  
State of California.

Appellant's Reply Brief in Opposition to  
Motion to Dismiss or Affirm.

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Public Utilities Commission,

*Appellees.*

On Appeal From the Supreme Court of the  
State of California.

**Appellant's Reply Brief in Opposition to  
Motion to Dismiss or Affirm.**

**1. The Constitutional Issue Was Timely and Properly  
Raised in the Proceedings Below.**

The Motion to Dismiss or Affirm states at pages 3 to 4 that appellant raised the constitutional question "for the first time in its petition for rehearing" and that such a filing is not timely under *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354 (1926). That statement either misdescribes what took place in this case or misinterprets the *Live Oak* decision. As the jurisdictional statement says (page 7), the constitutional

issue was raised in the application for rehearing *before the Commission*. This was timely under the express provisions of Section 1732 of the California Public Utilities Code cited at page 3 of the Jurisdictional Statement. Section 1732 provides as follows:

“The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.”

*Live Oak Ass'n v. Railroad Commission*, *supra*, in no way suggests that raising the constitutional issue for the first time in a petition for rehearing before the Commission is not timely. Rather, *Live Oak* merely holds that the constitutional issue must also be brought to the attention of the State Supreme Court at some stage earlier than in a petition for rehearing in that court. That was clearly done in the case at bench. The fourth specification of error in appellant's petition for writ of review concludes with the following (Appendix, pp. 122-123):

“ . . . that this Court. . . review Decision no. 85731 and vacate, annul and set aside the provisions thereof requiring the 36-month amortized rate reduction; and that unless this Court so acts, petitioner will be unjustly and unlawfully deprived of its property without due process of law and will sustain great and irreparable damage.”

Respondents next argue that this specification was insufficient under state law to preserve the point, because there was inadequate argument or citation of authority, citing *People v. McLean*, 135 Cal. 306 (1902); *Grayson v. Grayson*, 132 Cal.App.2d 471

(1955); *Utz v. Aureguy*, 109 Cal.App.2d 803 (1952). In those cases the appellant's brief wholly failed to state the ground upon which reversal was sought or wherein any error had been committed by the court below, in sharp contrast to the clear specification of error in this case. Further, in the case at bench the main thrust of appellant's brief in support of its petition for writ of review was the retroactive nature the Commission's order, and the key case of *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), was cited in both the opening and reply briefs (Appendix, pp. 143, 181).

## **2. The Non-Federal Basis for the California Supreme Court's Decision Did Not Dispose of the Federal Question.**

The California Supreme Court acknowledged that the order here in question was retroactive in effect (Appendix, pp. 21-22). It changed the previous order of the Commission pursuant to which appellant had lawfully collected the revenues in question. All that the California court decided was that this was permissible under state law. That decision in no way disposes of the federal question, which is whether such a retroactive change in the Commission's order comports with federal due process. That question remains for decision by this Court just as in each of the cases cited by respondent (p. 6) the Supreme Court, while accepting the state court's decision of state law questions, went on to deal with the federal questions remaining.

**Conclusion.**

We do not comment herein on respondents' statement (p. 7) that other utilities acquiesced in the order in question, since many factors not revealed by the record herein must be analyzed to determine the substantiality of the order's effect upon them. Otherwise, the other arguments made by respondents in support of the Motion to Dismiss or Affirm are answered in the jurisdictional statement.

For the reasons stated in the jurisdictional statement and herein, it is respectfully submitted that the Motion to Dismiss or Affirm should be denied and that this Court should assume jurisdiction of this case.

Respectfully submitted,

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WILLIAM E. MARX,  
*Of Counsel.*

Service of the within and receipt of a copy  
thereof is hereby admitted this ..... day  
of September, A.D. 1978.

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